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No. 80-304

In the Supreme Court of the United States

OCTOBER TERM, 1979

BENEDETTO J. MASSARELLA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. A. May a State, after the fact, transform an offense from a misdemeanor to a felony without violation of the anti-*ex post facto* guarantee, if only the defendant is not in fact sentenced to a period of time longer than the sentence which could have been imposed under the earlier statute.

1. B. Where petitioner's alleged perjury was classified under Illinois law as a *misdemeanor* when committed with an 18-month statute of limitations, and before expiration of the 18-month period, a new Illinois statute reclassified perjury as a Class 3 *felony* with a 3-year statute of limitations, was petitioner convicted of the felony offense in violation of the guarantee against *ex post facto* legislation, and did the trial court, therefore, improperly refuse to dismiss the perjury count upon petitioner's motion that the indictment was barred by the 18-month statute of limitations applicable to misdemeanors at the time of the alleged offense?

2. Was petitioner deprived of that fair trial to which he is constitutionally entitled by being forced to trial on the theft and conspiracy counts together with the perjury count, particularly if Question 1 be answered in petitioner's favor?

3. Did the Appellate Court, in effect, deprive petitioner of his right to meaningful appellate review, by the cursory manner in which it purported to decide a large number of important, federal constitutional issues against him, where it concluded the following issues were without merit, finding "no necessity to discuss them . . ."? As framed in petitioner's Brief below, these issues were [original number headings omitted]:

i. Defendant was deprived of his constitutional right to present defense evidence—part and parcel of due process of law—by erroneous rulings of the trial court, which: (A) unduly limited evidence sought to be presented by an expert witness; (B) improperly excluded evidence of conversations between defendant and his accountant; and (C) improperly excluded certain crucial defense evidence by a straitjacket application of the "best evidence" rule;

ii. The trial court committed prejudicial error in improperly limiting cross-examination of the prosecution's key witnesses against defendants, thereby depriving defendant of effective exercise of his constitutional right to confrontation;

iii. Defendant was prejudiced and deprived of a fair trial by the court's admission into evidence, over objection, of statements of an alleged co-conspirator after termination of any alleged conspiracy;

iv. Defendant was denied his Sixth Amendment right to confront witnesses when certain prior testimony of John Gavin, Sr., allegedly deceased, was read to the jury, [where]

(A) There was insufficient proof that John Gavin, Sr., who testified in the previous civil trial, was dead;

(B) Alternatively, admission of the prior testimony was prejudicial error as to defendant Massarella, who was not a party to the prior suit and hence had no opportunity to cross-examine the witness, and was prejudicial error in that neither the parties nor the issues in the prior suit were identical to those in the case at bar.

INDEX

PAGE

Judgments and Opinion Below 1

Jurisdictional Statement 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

1. *Ex Post Facto*—Statute of Limitations 4

2. Severance 5

3. Multiple Inadequately Resolved Issues of Constitutional Magnitude 6

   i. Denial of right to present defense evidence 6

      A. Limitation of defense expert 6

      B. Exclusion of conversations between petitioner and his accountant 6

      C. Exclusion of crucial defense evidence via best evidence rule 6

   ii. Limitation of cross-examination and right of confrontation 7

   iii. Post-conspiracy statements 8

   iv. Testimony of deceased witness; violation of right to confrontation 8

Reasons for Granting the Writ 10

1. Where petitioner's alleged perjury was classified under Illinois law as a *misdemeanor* when committed with an 18-month statute of limitations, and before expiration of the 18 month period, a new Illinois statute reclassified perjury as a Class 3 *felony* with a 3-year statute of limitations, petitioner was convicted of the

PAGE

felony in violation of the constitutional guarantee against *ex post facto* legislation; the trial court therefore improperly refused to dismiss the perjury count upon petitioner's motion that the indictment was barred by the 18-month statute of limitations applicable to misdemeanors at the time of the alleged offense.

Certiorari should be allowed to permit this Court to consider a serious question of federal constitutional law which has not yet been, but should be, decided by this Court; that is, whether a State may, after the fact, transform an offense from a misdemeanor to a felony without violation of the anti-*ex post facto* guarantee, if only the defendant is not in fact sentenced to a period of time longer than the sentence which could have been imposed under the earlier statute. The State court's rulings violate principles set forth by this Court 10

2. Petitioner was deprived of that fair trial to which he is constitutionally entitled by being forced to trial on the theft and conspiracy counts together with the perjury count, particularly if Point 1 is resolved in petitioner's favor.

Certiorari should be allowed to curb the dangerous trend in State criminal trials requiring defendants to stand joint trial on multiple counts, regardless of the probable impact on the fairness of the trial 16

A. Petitioner was denied a fair trial in that the jury was presented evidence concerning the alleged perjury in Cause No. 71 CH 3608 (Count 3) because said count should have been dismissed 16

B. Petitioner should have been relieved of the prejudicial joinder for trial, even if the perjury charge was properly brought 18

PAGE

3. The Appellate Court, in effect, deprived petitioner of his right to meaningful appellate review, by the cursory manner in which it purported to decide a large number of important, federal constitutional issues against him, where it concluded the following issues were without merit, finding "no necessity to discuss them;" such issues, as framed in petitioner's Brief below, were [original number headings omitted]:

i. Defendant was deprived of his constitutional right to present defense evidence—part and parcel of due process of law—by erroneous rulings of the trial court, which: (A) unduly limited evidence sought to be presented by an expert witness; (B) improperly excluded evidence of conversations between defendant and his accountant; and (C) improperly excluded certain crucial defense evidence by a strait-jacket application of the "best evidence" rule.

ii. The trial court committed prejudicial error in improperly limiting cross-examination of the prosecutor's key witnesses against defendants, thereby depriving defendant of effective exercise of his constitutional right to confrontation.

iii. Defendant was prejudiced and deprived of a fair trial by the court's admission into evidence, over objection, of statements of an alleged co-conspirator after termination of any alleged conspiracy.

iv. Defendant was denied his Sixth Amendment constitutional right to confront witnesses when certain prior testimony of John Gavin, Sr., allegedly deceased, was read to the jury. [where]

PAGE

A. There was insufficient proof that John Gavin, Sr., who testified in the previous civil trial was dead;

B. Alternatively, admission of the prior testimony was prejudicial error as to defendant Massarella, who was not a party to the prior suit and hence had no opportunity to cross-examine the witness, and was prejudicial error as to all appealing defendants (including Massarella) in that neither the parties nor the issues in the prior suit were identical to those in the case at bar 19-20

A. There was insufficient proof that John Gavin, Sr., who testified in the previous civil trial, was dead 25

B. There was no identity of parties or issues 25

Conclusion 26

Appendix A—Opinion of the Appellate Court .....App. 1

Appendix B—Order denying Petition for Rehearing February 8, 1980 .....App. 31

Appendix C—Order denying Petition for Leave to Appeal on May 29, 1980 .....App. 31

Appendix D—Excerpts from original opinion .....App. 32

AUTHORITIES CITED

Cases

Baines v. United States, 426 F.2d 833 (5 Cir. 1970) 20

Beazell v. Ohio, 269 U.S. 167 (1925) 13

Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798) 13

PAGE

California v. Green, 399 U.S. 149 (1970) 25

Chambers v. Mississippi, 410 U.S. 284 (1973) 21

Chapman v. California, 386 U.S. 18 (1967) 20

Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964) 17, 18

Cummings v. Missouri, 71 U.S. 277 (1867) 15

Davis v. Alaska, 415 U.S. 308 (1974) 23, 24

DeMarco v. United States, 415 U.S. 449 (1974) 23

Dobbert v. Florida, 432 U.S. 282 (1977) 13

Ex parte Garland, 71 U.S. 333 (1867) 15

Geraghty v. United States Parole Commission, 579 F.2d 238 (3 Cir. 1978) 13

Giglio v. United States, 405 U.S. 150 (1972) 23

Ginsberg v. New York, 390 U.S. 629 (1968) 15

Kotteakos v. United States, 328 U.S. 750 (1946) 20

Kring v. Missouri, 107 U.S. 221 (1882) 13

Krulewitch v. United States, 336 U.S. 440 (1949) 24

Lindsey v. Washington, 301 U.S. 397 (1937) 13

McInturff v. Insurance Co. of North America, 248 Ill. 92, 93 N.E. 369 (1910) 26

Napue v. Illinois, 360 U.S. 264 (1959) 23

People v. Carpenter, 28 Ill.2d 116, 190 N.E.2d 738 (1963) 21

People v. Cook, 33 Ill.2d 363, 211 N.E.2d 374 (1965) 21

People v. Fiorita, 339 Ill. 78, 170 N.E. 690 (1930) 21

People v. Hicks, 28 Ill.2d 457, 192 N.E.2d 891 (1963) 17

PAGE

People v. Liebling, 36 Ill.App.3d 1073, 344 N.E.2d 520 (1 Dist. 1976) 11

People v. Stapelton, 4 Ill.App.3d 477, 281 N.E.2d 76 (3 Dist. 1972) 21

Pollard v. United States, 352 U.S. 354 (1957) 14

Sibron v. New York, 392 U.S. 40 (1968) 14, 15

Simmons v. United States, 390 U.S. 377 (1968) 12

Sylvania Electric Products, Inc. v. Flanagan, 352 F. 2d 1005 (1 Cir. 1965) 22

United States v. Dickens, 417 F.2d 958 (8 Cir. 1969) .. 23

United States v. Dickens, 479 P.2d 302 (1970) 23

United States v. Padgent, 432 F.2d 701 (2 Cir. 1970).... 24

United States v. Hall, 26 Fed. Cas. No. 15,285, p. 84, 2 Wash. C.C. 366, *aff'd*, 10 U.S. (6 Cranch) 171, 3 L.Ed. 189 (1810) 13

United States v. Morgan, 346 U.S. 502 (1954) 14

Washington v. Texas, 388 U.S. 14 (1967) 21

Whitton v. State, 479 P.2d 302 (Alaska 1970) 24

Yellow Cab Co. v. Henderson, 183 Md. 546, 39 A.2d 546 (1944) 26

Other Authorities

U.S. Const., Art. I, §§ 9 & 10 10

Sixth Amendment to U.S. Const. 19, 22, 24, 25

Ill.Const. of 1970, Art. I, § 16 10

Ill. Const. of 1970, Art. III, sec. 2 14

Ill.Rev.Stat. 1973 chap. 38, sec. 114-18 18

Ill.Rev.Stat., chap. 38, sec. 1005-5-3.2(b)(1) 14

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BENEDETTO J. MASSARELLA,

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Benedetto J. Massarella, respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, First District, to review its decision affirming his convictions for conspiracy, theft and perjury, and his sentences for theft and perjury, as adjudged by the Circuit Court of Cook County, Illinois.

Judgments and Opinion Below

The opinion of the Appellate Court of which we seek review by Certiorari is reported, *People* v. *Massarella,* 80 Ill.App.3d 552, 36 Ill.Dec. 16, 400 N.E.2d 436 (1 Dist. 1979)

(set forth as Appendix A hereto).[1] On petitioner's original appeal, the Appellate Court agreed that the indictment should have been dismissed for improper participation of the Attorney General of Illinois (App. 2), and reversed his convictions without deciding the remaining issues raised. *People* v. *Massarella,* 53 Ill.App.3d 774, 10 Ill.Dec. 912, 368 N.E.2d 507 (1 Dist. 1977). The Illinois Supreme Court allowed the State's petition for leave to appeal, No. 50113, reversed, and remanded to the Appellate Court for consideration of the remaining unresolved issues. *People* v. *Massarella,* 72 Ill.2d 531, 21 Ill.Dec. 898, 382 N.E.2d 262 (1978).

Jurisdictional Statement

On December 18, 1979, the Appellate Court of Illinois, First District, Second Division, entered its judgment affirming petitioner's convictions and sentences. (App. A) Petitioner's timely petition for rehearing was denied on February 8, 1980. (App. B) A petition for leave to appeal to the Illinois Supreme Court, timely filed, was denied on May 29, 1980, No. 53179. (App. C) This Petition is filed within the time allowed by Order of Mr. Justice Stevenson entered on July 30, 1980, (Interim # A90), extending the time until August 27, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 20.1 of this Court.

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[1] The judgment was "Affirmed in part; reversed and remanded in part." (App. 26) The only portions of the judgment reversed and remanded were those pertaining to the sentencing of Bee Jay's Truck Stop, Inc., and Mideast Transport, Inc. [These corporate defendants are, aside from the parties listed in the caption in this Court, the only other parties to the proceedings in the court whose judgment is sought to be reviewed, per Rule 21.1(b).]

Constitutional Provisions and Statutes Involved

Art. I, § 9, cl. 3, United States Constitution, provides, in part:

> "No . . . ex post facto Law shall be passed."

Art. I, § 10, cl. 1, United States Constitution, provides, in part:

> "[No State shall] pass any . . . ex post facto Law, . . ."

Art. 1, § 16, Illinois Constitution of 1970, provides, in part:

> "No ex post facto law . . . shall be passed."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions the accused shall enjoy the right to a . . . trial by an impartial jury . . . ; . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1 . . . [N]or shall any State deprive any person . . . of liberty . . . , without due process of law; . . ."

There is no issue in this Petition to the interpretation of any Illinois Statute.*

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* This is the first petition for certiorari present counsel ever have prepared under this Court's salutary new Rules, so we beg Your indulgence for any "technical" violations. In the event it is believed the Illinois statutes should have been included *verbatim* though counsel represent that no issues as to the interpretation of any Illinois statutes are involved, we are hopeful the Court might allow copies to be filed as an additional Appendix, via the spirit of Rule 33.7.

Statement of the Case

To the extent that the Appellate Court's Opinion (App. A) contains material to meet the requirements of Rule 21.1(g), such is here incorporated by reference to avoid unnecessary duplication. That Court's earlier opinion, 53 Ill.App.3d 774, 10 Ill.Dec. 912, 368 N.E.2d 507, 508-09, adopted in the later opinion (App. 3), contains a statement of underlying facts, herein adopted for purposes of this Petition, and set out as App. D.

The specific facts pertaining to the Points which follow, including the raising of the federal questions below per Rule 21.1(h), are as follows:

1. *Ex Post Facto—Statute of Limitations*

Petitioner was indicted in Count 3 for statements made between August 26, 1971 and August 30, 1971. The statute prescribing the penalty for perjury in 1971 is set out at App. 3; under applicable Illinois law, the alternative penalty of imprisonment other than in the penitentiary caused perjury, in 1971, to be classified as a misdemeanor.[2] At that time, per Ill.Rev.Stat. 1971, ch. 38, § 3-5, the statute of limitations for all misdemeanors was 18 months.

The indictment here, returned June 8, 1973, (R. 2),[3] was returned beyond the 18-month period of limitations for a misdemeanor, approximately 22 months after the alleged perjury. About a month before the 1971 18-month limitation period expired in February, 1973, Illinois' Unified

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[2] See App. 3.

[3] "R." refers to the Common Law Record; "Tr." to the Transcript of Proceedings at Trial. Additional material, contained in two supplements to the Record is hereafter referred to as "Supp. R. 1" and "Supp. R. 2."

Code of Corrections took effect on January 1, 1973. Under the new Code, perjury is a Class 3 felony, Ch. 38, § 32-2, Ill.Rev.Stat. 1973, with a statute of limitations of 3 years. Ch. 38, § 3-5, Ill.Rev.Stat. 1973.

Petitioner's motion to dismiss Count 3 on grounds it was barred by the statute of limitations (R. 104, pars. 1 & 21), was denied by the trial court, based on the State's argument that "whether the statute of limitations has run is a procedural question governed by the new Uniform Code of Corrections in effect at the time of indictment. Ill.Rev.Stat. ch. 131, sec. 4 . . ." (R. 134-35, 261-62)

The Appellate Court, ruling against petitioner on the merits of his *ex post facto* argument, affirmed the trial court's position. (App. 6)

2. *Severance*

The trial court denied petitioner's motion to sever the perjury counts from the remaining counts for trial. (Tr. 3; Supp. R. 2, p. 170; see Supp. R. 2, p. 35) Defendant urged in the trial court and in the Appellate Court that such joint trial violated his constitutional right to a fair trial. (See R. 314-15.) Requiring petitioner to stand trial jointly on the perjury count—which should have been dismissed—along with the other counts, resulted in the following: (a) the jury was thus permitted to be advised of accusations of other crimes; (b) the jury was exposed to otherwise inadmissible evidence (petitioner's testimony in the civil proceeding (Tr. 1234-39) and (c) defendant was thereby coerced to testify. The Appellate Court affirmed the trial court's ruling. (App. 18-21)

3. *Multiple Inadequately Resolved Issues of Constitutional Magnitude*

i. *Denial of right to present defense evidence.*

A. Limitation of defense expert.

Petitioner attempted to introduce evidence through one, Milton Lambert, a licensed distributor of gasoline products, who was shown to be an expert in the field of fuel distribution at filling stations, having been active in that business for some 40 years. (Tr. 1674) Bee Jay's Truck Stop, Inc., was one of his customers. (Tr. 1684) The court sustained virtually all the State's objections to his testimony. (Tr. 1671, 1721, 1673-1701) State's witnesses *were* permitted to testify to similar matters based on *their* expertise in the business in question. (Tr. 162-64, *et seq.*)

B. Exclusion of conversations between petitioner and his accountant.

In an attempt to demonstrate petitioner's state of mind, the defense sought to introduce evidence of conversations between petitioner and his accountant, Mr. Fertel, regarding an audit of Bee Jay's Truck Stop, Inc.'s books for 1969 and 1970, times within the indictment period. The court excluded such evidence on the State's hearsay objection. (Tr. 1769)

C. Exclusion of crucial defense evidence via best evidence rule.

Petitioner attempted to introduce Def. Ex. 33, purporting to be a copy of an application for an Illinois State license issued to the White tractor-truck. (Tr. 1871-76) At issue at trial was ownership of this vehicle; per petitioner's testimony, it was owned at all times pertinent to the case at bar by Mid-East Transport, Inc., of which

company Gino Fortuna was President, (Tr. 1868-69), while the State maintained that it really belonged to petitioner. Since this particular truck was seen picking up various loads of fuel from various distributors, and the State sought to make petitioner responsible for taxes due on that fuel (though he denied having received or resold it), ownership of this truck was a crucial issue for the defense.

Per the proffered exhibit, the truck was owned by Mideast Transport, Inc., (Tr. 1871-76), a corporation of which Fortuna was president. (Tr. 1872) Thus admission of the license application would have corroborated some essential aspects of petitioner's testimony.

Though there was no issue as to authenticity, the court sustained the State's objection to its admission, based solely upon the "best evidence" rule. (Tr. 1873-75)

ii. *Limitation of cross-examination and right of confrontation.*

Mr. Peterson was a crucial prosecution witness. Defense counsel attempted to show his interest in testifying favorably for the prosecution by demonstrating that certain of his activity was criminal and he was testifying to obtain the benefit of not being prosecuted. (Tr. 420, 425-26)

Similarly, there was improper limitation of cross-examination of witness Wright, when petitioner was prevented from inquiring whether he feared indictment due to his involvement in order to prove this affected his testimony. (Tr. 839-41)

The court similarly limited defendant when he was prevented from demonstrating, via extrinsic evidence through cross-examination of investigator Weeditz, that Peterson in fact had been investigated. (Tr. 1431-33)

The court also limited the cross-examination of Gino Fortuna and prevented petitioner from presenting extrinsic evidence concerning Mr. Fortuna's bias against him. Petitioner contended that Mr. Fortuna was initially a trusted employee, who then voided said trust and was testifying to hide his own improper motives and illegal actions, and out of anger at being fired. (Tr. 1861-62, 1895-99) Defense counsel attempted to lay the foundation to prove that petitioner had trusted Mr. Fortuna and then had accused Mr. Fortuna of stealing and fired him. (Tr. 734-35)

iii. *Post-conspiracy statements.*

Co-defendant Battersby, an alleged co-conspirator who pleaded guilty before petitioner's trial commenced and who testified for the prosecution against petitioner, was permitted to testify over defense objection concerning statements he made *after* termination of the alleged conspiracy. The jury was informed that Battersby had testified in the prior proceedings pursuant to subpoena from "Mr. Massarella's attorney." (Tr. 333) The post-conspiracy statements of Battersby, which the State was permitted to use, consisted mainly of Battersby's own testimony in those prior proceedings, which testimony, at the time he testified against petitioner in the case at bar, he (Battersby) now disclaimed as false, maintaining his present testimony, in conflict with that prior testimony, was true. (Tr. 333-40)

iv. *Testimony of deceased witness; violation of right to confrontation.*

Over objection of defendants, the State was permitted to introduce the prior testimony of a John Gavin, Sr.,

given on August 24, 1971 in a previous civil suit. (Tr. 526-47)[4] Additional facts *re* this Point are in the argument.

As to all issues mentioned within Point 3, the Appellate Court affirmed. (App. 21)

* * *

Each of the arguments raised in this Petition, Points 1, 2 and 3, was raised in the petition for leave to appeal in the Illinois Supreme Court, which denied review without opinion. (App. C)

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[4] Ruth Francisco, employed by Great West Truck Lines, Inc. from 1966 to 1971 testified her immediate supervisor was John Gavin, Company President. Mideast Transport Inc. leased the rights from Great West to haul their own products. (Tr. 465-500) John Gavin was now deceased. (Tr. 479)

Over objections, the State introduced into evidence Exhibit 43, a certified copy of the death certificate of one, John D. Gavin. The State offered to introduce one, John Gavin, Sr.'s testimony from a civil case entitled, *Bee Jay's Truck Stop Inc. and Illinois Gasoline Dealers Association* v. *Illinois Department of Revenue, George Mann, and Tony Weeditz,* Circuit Court of Cook County #71 CH 4608. (Tr. 518) The court overruled petitioner's objections that no proof was shown that the dead man was the same man who testified, and the jury heard the transcript of the testimony of John Gavin, Sr. in the aforesaid case read to it to the effect that his company, Great West Truck Lines, leased a truck from Mideast Trucking Co. which he *believed* to be a firm of Ben Massarella with whom he dealt, he dealt with Mideast. Mideast used his Illinois Commerce Commission authority to haul. The witness John Gavin, Sr. billed Humboldt Oil and paid for the lease of equipment and he paid Massarella through the company, Mideast, but he was not sure of the name in which the witness' company was licensed as a common carrier by the State of Illinois. The rental of the truck was $30 per load. (Tr. 527-47)

REASONS FOR GRANTING THE WRIT

1.

Where petitioner's alleged perjury was classified under Illinois law as a *misdemeanor* when committed with an 18-month statute of limitations, and before expiration of the 18 month period, a new Illinois statute reclassified perjury as a Class 3 *felony* with a 3-year statute of limitations, petitioner was convicted of the felony in violation of the constitutional guarantee against ex post facto legislation; the trial court therefore improperly refused to dismiss the perjury count upon petitioner's motion that the indictment was barred by the 18-month statute of limitations applicable to misdemeanors at the time of the alleged offense.

Certiorari should be allowed to permit this Court to consider a serious question of federal constitutional law which has not yet been, but should be, decided by this Court; that is, whether a State may, after the fact, transform an offense from a misdemeanor to a felony without violation of the anti-ex post facto guarantee, if only the defendant is not in fact sentenced to a period of time longer than the sentence which could have been imposed under the earlier statute. The State court's rulings violate principles set forth by this Court.

Petitioner was charged in Count 3 with perjury for statements made August, 1971, in an indictment returned June 8, 1973, (R. 2), some 4 months beyond the 18-month period of limitations applicable to misdemeanors in 1971, when the statements were made. Chap. 38, sec. 3-5, Ill.Rev. Stat. 1971. It is undisputed that in August, 1971, perjury was a misdemeanor. (App. 3-4) Accordingly, petitioner moved to dismiss Count 3 on grounds it was barred by

the Statute of Limitations. (See pp. 4-5, *supra.*) The Appellate Court affirmed the trial court's order denying the motion. (App. 4)

Reclassification of perjury from a misdemeanor to a felony, violates the *ex post facto* prohibition of the State and Federal Constitutions (Ill. Const. of 1970, Art. I, § 16; U.S. Const., Art. I, §§ 9 & 10).

The Appellate Court rationalizes its holding, affirming the trial court's refusal to dismiss the indictment on statute of limitations grounds, in a twofold manner: First, that petitioner's exercise of his option to elect whether to be sentenced under the law as it exists at the time of sentencing or as it existed when the offense was committed, eliminates any *ex post facto* problem; and Secondly:

> "[A]lthough it is the general rule that punishment for an offense cannot be increased by an amendatory act taking effect after the offense has been committed without violating the *ex post facto* doctrine . . . , the criterion for determining the lesser penalty is the actual term of imprisonment imposed. . . Massarella's sentence of one to three years in the penitentiary did not exact a penalty greater than that permissible under the 1971 statute classifying perjury as a misdemeanor." (Op. pp. 4-5, App. 5-6)

In the first aspect of its ruling, the Appellate Court followed another First District opinion, *People* v. *Liebling,* 36 Ill.App.3d 1073, 344 N.E.2d 520, 522 (1 Dist. 1976), which, we submit, should not be deemed controlling,[5] or,

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[5] In *Liebling,* the reviewing court was not confronted by the basic constitutional issue raised by defendant here—*i.e.,* that the consequences accruing to a felony (as opposed to misdemeanor) conviction, over and above the question of sentencing, are such that transforming a misdemeanor to a felony violates the *ex post facto* prohibition.

alternatively, *Liebling* should be disapproved as espousing doctrine violative of constitutional guarantees, for the reasons set forth below.

Moreover, petitioner's so-called "election" must not, under the circumstances, amount to relinquishment of the substantial *ex post facto* argument. The argument, first raised on a pre-trial motion to dismiss the perjury charge, (R. 104, pars. 1 & 21), was rejected by the trial court; the motion was denied, and petitioner was tried and convicted. His subsequent election to be sentenced under the New Code cannot properly be construed as a waiver or consent as to the original argument, against which the court had ruled prior to trial.

Does a defendant give up a constitutional right beacuse, after the lower court has ruled against him on such an issue, he is forced (pending appeal, of course) to abide by the lower court's ruling, and thus to make the best of a bad situation? Given a Hobson's choice, one must not be damned for making any choice at all. *Cf. Simmons* v. *United States,* 390 U.S. 377, 394 (1968).[6]

To the extent *Liebling* may require or authorize the instant holding, that case should be disapproved by this Court.

In the second aspect of its ruling on this issue, the Appellate Court has run afoul of controlling precedent from this Court. Contrary to the court's erroneous position that what governs is the penalty actually imposed, it is clear that aggravation of the offense (such as here, by transforming a former misdemeanor into a felony), as a distinct factor from sentencing considerations alone, is crucial. Any post-act change in the law which is more burden-

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[6] "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."

some to defendant[7] or which operates to his disadvantage[8] —over and above sentencing considerations—is an *ex post facto* law barred by the Constitution.[9]

This distinction between laws that "aggravate" a crime or "make it greater than it was, when committed," on the one hand, and laws that "inflict a greater punishment," on the other, clearly demonstrates that there is more to *"ex post facto"* than merely consideration of the penalty imposed.

The patent error of the Appellate Court's position—that "the actual term of imprisonment imposed" governs the *ex post facto* determination—is obvious from *Lindsey* v. *Washington,* 301 U.S. 397 (1937). The Appellate Court's decision here directly conflicts with *Lindsey's* specific holding:

> "But the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution for-

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[7] See *Dobbert* v. *Florida,* 432 U.S. 282, 292 (1977), quoting with approval from *Beazell* v. *Ohio,* 269 U.S. 167, 169-70 (1925).

[8] See *Kring* v. *Missouri,* 107 U.S. 221, 235 (1882), quoting *United States* v. *Hall,* 26 Fed. Cas. No. 15,285, p. 84, 2 Wash. C.C. 366, *affd,* 10 U.S. (6 Cranch) 171, 3 L.Ed. 189 (1810), quoted and relied on in *Geraghty* v. *United States Parole Commission,* 579 F. 2d 238, 264 (3 Cir. 1978).

[9] "[The following kinds of laws are] *ex post facto* laws within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which innocent when done, criminal; and punishes such action. 2d. *Every law that aggravates a crime, or makes it greater than it was, when committed.* 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence . . . in order to convict the offender." *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648, 650 (1798). (Emphasis added.)

> bids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer.'' *Id.* at 402.

Changing the offense from a misdemeanor to a felony involves consequences which necessarily operate to the defendant's detriment or disadvantage and which render the penalty more burdensome. While such additional consequences may not involve the actual length of sentences, still they are consequences which accrue to a felony conviction. The effect of such collateral (non-sentence factor) consequences has been acknowledged by this Court in *Sibron* v. *New York,* 392 U.S. 40 (1968).[10] Therefore, ruled this Court:

> '' '[T]he possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.' '' *Ibid.,* quoting from *Pollard* v. *United States,* 352 U.S. 354, 358 (1957).

The change of an offense from a misdemeanor to a felony, as at bar, violates the *ex post facto* constitutional prohibition because collateral consequences apply to the convicted felony which did not apply when the offense was a misdemeanor.[11] For instance, disabilities respecting li-

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[10] "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.' " *Id.* at 55, quoting from *United States* v. *Morgan,* 346 U.S. 502, 512-13 (1954).

[11] For example: A person convicted of a felony is subject to certain enhanced penalties upon a subsequent conviction, not applicable if the prior conviction was for a misdemeanor. See, *e.g.,* Ill. Rev. Stat., chap. 38, sec. 1005-5-3.2(b)(1).

Moreover, conviction of a felony results in more serious loss of civil rights than conviction of a misdemeanor. Under Ill. Const. of

(footnote continued)

censing provisions are collateral consequences of a conviction. *Sibron* v. *New York, supra* at 54, n.14; *Ginsberg* v. *New York,* 390 U.S. 629, 633 n.2 (1968).[12]

• • •

Certiorari should be allowed, not only to relieve petitioner of the consequences of his unconstitutional conviction for perjury, but also to permit this Court to correct a dangerous trend eroding the constitutional prohibition against *ex post facto* laws, as evidenced in Illinois by *Liebling, supra,* and by the case at bar.

(footnote continued)

1970, Art. III, sec. 2, while a person convicted of a misdemeanor loses his right to vote only during the period of his actual confinement, one convicted of a felony loses his right to vote until completion of his sentence, even if he is not confined to a penal institution. See Committee Comments to Art. III, sec. 2.

In Illinois, a felony conviction has disqualifying effects on one's right to hold various licenses, which onus does not exist upon conviction for a misdemeanor. Illinois statutory provisions disabilities associated with felony convictions, all in ch. 111, include: Sec. 404, livestock dealer; Sec. 1210, architect; Sec. 1612 & 1614, barber; Sec. 2505, funeral director; Sec. 2817, embalmer; Sec. 3206, registered land surveyor: Sec. 6506 & 6512, structural engineers; Sec. 209, swine dealers; Sec. 6913, veterinarians; Sec. 4433, physicians.

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[12] For yet another aspect of the *ex post facto* prohibition over and above the question of sentence length, see *Cummings* v. *Missouri,* 71 U.S. 277 (1867), and *Ex parte Garland,* 71 U.S. 333 (1867), both holding invalid, provisions disqualifying one from holding certain offices or practicing specific professions on the basis of acts already proscribed, where the disqualification was enacted after commission of the act.

2.

Petitioner was deprived of that fair trial to which he is constitutionally entitled by being forced to trial on the theft and conspiracy counts together with the perjury count, particularly if Point 1 is resolved in petitioner's favor.

Certiorari should be allowed to curb the dangerous trend in State criminal trials requiring defendants to stand joint trial on multiple counts, regardless of the probable impact on the fairness of the trial.

The Appellate Court, having rejected petitioner's contention that the perjury charge should have been dismissed, likewise rejected the concomitant argument that severence should have been allowed.

A. Petitioner was denied a fair trial in that the jury was presented evidence concerning the alleged perjury in Cause No. 71 CH 3608 (Count 3) because said count should have been dismissed.

As demonstrated in Point 1, *supra,* the court should have dismissed Count 3 prior to trial. The court's error in refusing to dismiss this count prejudiced petitioner as to the offenses of conspiracy and theft, because it: (a) permitted the jury to be advised of accusations of other crimes; (b) caused the jury to be exposed to otherwise inadmissible evidence, *i.e.,* his testimony in Cause No. 71 CH 3608, which would not otherwise have been admissible except for possible impeachment; and (c) coerced him to testify. Petitioner's motion for severance should have been allowed. (See R. 314-15)

Petitioner was also prejudiced, because the jury thus was presented his testimony given in the prior civil proceeding. (Tr. 1234-39) If the court had properly dismissed

Count 3, this evidence could not have been admitted at trial, at least not in the excised manner in which it actually was presented.[13] Had the perjury count properly been dismissed, petitioner's prior testimony could have been introduced against him only as a prior statement against penal interest or for impeachment purposes. The manner of its introduction here satisfied neither of these rules.

Joinder of offenses for trial which thus puts a defendant in the position of being unable individually to weigh the factors militating for and against exercising his right to testify or not to testify as to each charge constitutes prejudicial joinder from which he should be relieved by the court upon proper motion. *Cross* v. *United States,* 335 F.2d 987 (D.C. Cir. 1964).[14]

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[13] Over defense objection the prosecution was permitted to present small portions of petitioner's testimony. (Tr. 1213-17) The court denied petitioner's request to have the entirety of his prior testimony presented. (Tr. 1217) This violated the rule that where portions of a person's statement or testimony are admitted against him as statements against penal interest, he has a right to have the statement or testimony in question admitted in its entirety. *People* v. *Hicks,* 28 Ill.2d 457, 192 N.E.2d 891 (1963).

[14] "[A defendant's] decision whether to testify will reflect a balancing of several factors with respect to each count. . . . But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of the express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent." *Cross* v. *United States, supra,* at 989.

B. Petitioner should have been relieved of the prejudicial joinder for trial, even if the perjury charge was properly brought.

The joinder of the perjury charges with the other charges for trial was a prejudicial joinder from which petitioner should have been relieved by the court upon proper motion for such relief pursuant to Chap. 38, sec. 114-8, Ill. Rev. Stat. 1973. (See Supp. R. 2, p. 35; R. 314-15.)

For one thing, the joinder impossibly confounded his ability to defend the multiple charges by eliminating the possibility of his choosing to testify on less than all of the charges. See *Cross* v. *United States, supra.*

Since petitioner's credibility was in issue—he did testify in his own behalf—the trial jury's assessment of his credibility was necessarily adversely affected by their knowledge that the grand jurors believed he had already lied under oath.

For the foregoing reasons, the court's ruling denying defendant's pre-trial motion for severance was in error, and his ensuing joint trial was fundamentally unfair.

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Certiorari should be allowed so that this Court may address itself to the serious problems regarding the fair trial guarantee in disposition of motions for severance in situations as here, where there is a genuine question as to the validity of the perjury charge.

3.

The Appellate Court, in effect, deprived petitioner of his right to meaningful appellate review, by the cursory manner in which it purported to decide a large number of important, federal constitutional issues against him, where it concluded the following issues were without merit, finding "no necessity to discuss them;" such issues, as framed in petitioner's Brief below, were [original number headings omitted]:

i. **Defendant was deprived of his constitutional right to present defense evidence—part and parcel of due process of law—by erroneous rulings of the trial court, which: (A) unduly limited evidence sought to be presented by an expert witness; (B) improperly excluded evidence of conversations between defendant and his accountant; and (C) improperly excluded certain crucial defense evidence by a straitjacket application of the "best evidence" rule.**

ii. **The trial court committed prejudicial error in improperly limiting cross-examination of the prosecutor's key witnesses against defendants, thereby depriving defendant of effective exercise of his constitutional right to confrontation.**

iii. **Defendant was prejudiced and deprived of a fair trial by the court's admission into evidence, over objection, of statements of an alleged co-conspirator after termination of any alleged conspiracy.**

iv. **Defendant was denied his Sixth Amendment constitutional right to confront witnesses when certain prior testimony of John Gavin, Sr., allegedly deceased, was read to the jury. [where]**

   A. **There was insufficient proof that John Gavin, Sr., who testified in the previous civil trial was dead;**

B. Alternatively, admission of the prior testimony was prejudicial error as to defendant Massarella, who was not a party to the prior suit and hence had no opportunity to cross-examine the witness, and was prejudicial error as to all appealing defendants (including Massarella) in that neither the parties nor the issues in the prior suit were identical to those in the case at bar.

After listing the gist of these issues, (Op. 18, App. 21), the Appellate Court merely states:

> "Having carefully reviewed the record and the authorities cited by the defendants, we find no merit in these contentions and no necessity to discuss them here." (Op. p. 19, App. 21)

This, despite that (as pointed out to the Appellate Court) these issues assert errors reaching constitutional proportions. In assessing the probable prejudicial impact of the trial errors asserted herein, this Court should apply the proper standards for appellate review, requiring, *inter alia,* that the *cumulative* prejudicial effect of multiple trial errors be considered. *Kotteakos* v. *United States,* 328 U.S. 750, 761-65 (1946); *Baines* v. *United States,* 426 F.2d 833, 835 (5 Cir. 1970). And as to errors of constitutional dimension, of course, this Court may not affirm unless it can declare, beyond a reasonable doubt, that such errors could not have contributed to the conviction. *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

Since each of these issues asserts that error of constitutional magnitude infected the fairness of petitioner's trial —and none was properly dealt with by the reviewing court thus far—the arguments as presented to the Appellate Court will herein be synopsized so that this Court may realize what the Appellate Court refused to discuss. (The pertinent facts are set out at pp. 6-9, *supra.*)

i. A defendant charged with a crime in the State courts has a federally protected constitutional right to present evidence on his own behalf. *Chambers* v. *Mississippi,* 410 U.S. 284 (1973); *Washington* v. *Texas,* 388 U.S. 14 (1967).

A. The court's determination that Lambert was not properly qualified as an expert so as to be permitted to render an opinion (Tr. 1721) is clearly erroneous and an abuse of discretion upon this record. Lambert possessed such skills, training and experience in the industry in question that he was well-qualified to render expert assistance to the jury in an area in which lay persons generally have no expertise. See, *e.g., People* v. *Fiorita,* 339 Ill. 78, 170 N.E. 690 (1930); *People* v. *Stapelton,* 4 Ill.App.3d 477, 281 N.E.2d 76 (3 Dist. 1972).

B. Sustaining objection to Fertel's testimony on grounds of hearsay was error, for the proffered evidence was not being offered to prove the truth of its contents, but rather, merely to prove that petitioner had made such statements to his accountant at a time before he, petitioner, had any reason to fabricate, for at that time he was not aware of any official investigation into his business activities.[15]

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[15] When testimony which would otherwise be inadmissible as hearsay is not offered to prove the truth of its contents, but rather, merely to prove that the statements were in fact made, the rule excluding hearsay does not apply, and the evidence is properly admissible. *People* v. *Carpenter,* 28 Ill.2d 116, 190 N.E.2d 738, 741 (1963). Moreover, since petitioner was in court and actually *did* testify and subject himself to cross-examination, the main reason for applicability of the hearsay rule—*i.e.,* inability of the adverse party to cross-examine the declarant—simply does not exist. *People* v. *Carpenter, supra,* at 741-42; *People* v. *Cook,* 33 Ill.2d 363, 211 N.E.2d 374, 378 (1965).

And the prejudicial impact of precluding Fertel's testimony was necessarily magnified in the eyes of the jury in that State's witnesses were permitted to testify as to what petitioner said to *them*. Again, as with the expert testimony question, the jury was exposed only to one side of the story.

C. *No question was raised as to the document's authenticity;* indeed, the only articulated ground for the State's objection and for the court's ruling was that petitioner failed to account for the original. "The best evidence rule should not be applied as a mere technicality." *Sylvania Electric Products, Inc.* v. *Flanagan,* 352 F.2d 1005, 1008 (1 Cir. 1965).

Again, since numerous exhibits proffered by the State were admitted despite the fact that they were mechanically reproduced copies rather than originals, (*e.g.,* Tr. 150), without the State's having accounted for the originals, the court's exclusion of Def. Ex. 33 was extremely prejudicial to petitioner.

* * *

The rulings herein complained of, considered both individually and cumulatively, operated to deprive petitioner of a fair trial by depriving him of his Sixth Amendment right to present defense evidence, an integral component of due process of law.

ii. In order to convict petitioner, the jury had to believe prosecution witnesses Peterson, Wright, and Fortuna, all essential prosecution witnesses. Petitioner had a right searchingly to cross-examine them concerning their motives for testifying, including delving deep into the questions of bias and prejudice which might have influenced their testimony. He had a right to have the jury fully cognizant of any and all factors which reasonably might have affected their credibility.

However, while permitting some degree of exercise of this right, the trial court impermissibly restricted the defense in cross-examining these witnesses. (See facts *re* this issue, pp. 7-8, *supra.*

The defense has a right to cross-examine a key prosecution witness as to the existence of any "deals" with the prosecution, whereby he expects to obtain some advantage in exchange for his testimony, as to any charges pending against him, or which could be brought against him. Such facts tend to show that kind of bias or motive on the witness' part as were held properly adducible in *Davis* v. *Alaska,* 415 U.S. 308, 315 (1974). See also *DeMarco* v. *United States,* 415 U.S. 449 (1974); *Giglio* v. *United States,* 405 U.S. 150 (1972); *Napue* v. *Illinois,* 360 U.S. 264 (1959).

Moreover, even if no direct promises have been made on the part of the prosecutor, the defense has a right to inquire of a prosecution witness whether he *believes* his giving testimony against defendant will benefit him (the witness), whether or not any such hope or belief has any foundation in fact, and even if such hope or belief is unreasonable.[16]

Of course, where the witness had not been charged with any offense prior to being cross-examined as to any expected benefit—*i.e.,* not being charged—the cross-examiner must demonstrate that the witness *knows* he has engaged in illegal activity for which he *could* be charged. See

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[16] "Whether or not a promise was actually made by the Assistant United States Attorney was irrelevant; the crucial factors were the witness' motive, state of mind and expectation in testifying." *United States* v. *Dickens,* 417 F.2d 958, 960 (8 Cir. 1969).

United States v. *Padgent*, 432 F.2d 701 (2 Cir. 1970); *Whitton* v. *State*, 479 P.2d 302, 316-18 (Alaska 1970).

Denial of the right of cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974). The court's improper limitation of defendant's Sixth Amendment right to impeach crucial prosecution witnesses deprived petitioner of a fair trial.

iii. The post-conspiratorial statements, which concerned co-defendant Battersby's testimony at the same prior civil trial as that giving rise to the perjury charge for which petitioner Masserella himself was convicted (Count 3) and to the perjury with which Battersby had been charged in Count 5, clearly conveyed to the jury the implication that petitioner had not only himself committed those offenses of which they found him guilty, but also that he had suborned Battersby's perjury in the prior proceedings as well.

The acts or declarations of a co-conspirator after termination of the alleged conspiracy are not admissible against another alleged co-conspirator. *Krulewitch* v. *United States*, 336 U.S. 440 (1949). The trial court permitted this evidence to be introduced and used against petitioner herein on the theory that even though the alleged conspiracy had ended, Battersby's post-conspiratorial statements were admissible to show the previous existence of a conspiracy. (Tr. 324-28)

This is not permissible under the rule as promulgated in *Krulewitch, supra*, from which rule this Court has never wavered. And moreover, to permit post-conspiratorial statements of one conspirator to be used against another for the purpose of demonstrating the prior existence of a

conspiracy is, in reality, bootstrap reasoning which has no place in a court of law.[17]

Because post-conspiratorial statements of a co-defendant were admitted against him and because the natural import of such evidence was so prejudicial, the cause should be reversed and remanded.

iv. The admission of the previous testimony of John Gavin, Sr., allegedly deceased, was prejudicial error, violative of petitioners constitutional right to confrontation.

A. There was insufficient proof that John Gavin, Sr., who testified in the previous civil trial, was dead.

The State, attempting to introduce such evidence, had the burden of proof. It attempted to sustain this burden by introducing a death certificate of a John D. Gavin. (Tr. 502-11) The State failed to prove from the mere similarity of names that John Gavin, Sr., whose prior testimony was introduced against petitioner, was the same person as the John D. Gavin whose death certificate was produced. Hence there was insufficient proof of the unavailability of the witness to give testimony in the case at bar.

Proof of the witness' unavailability is prerequisite to override a defendant's Sixth Amendment right to confrontation by allowing the prosecution to use his former testimony. See *California* v. *Green*, 399 U.S. 149 (1970).

B. There was no identity of parties or issues.

At the previous trial, the plaintiffs were Bee Jay's Truck Stop, Inc. and Illinois Gasoline Dealers Ass'n. Petitioner Massarella was not a party to that suit as an individual, and hence, in his individual capacity had no

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[17] Indeed, it is little different from upholding a search based on what was discovered in the course of the search itself.

right to cross-examine said witness at the prior hearing. Hence, since he had no right to cross-examine said witness, admission of Gavin's prior testimony was in error as to him. *McInturff* v. *Insurance Co. of North America,* 248 Ill. 92, 93 N.E. 369 (1910); *Yellow Cab Co.* v. *Henderson,* 183 Md. 546, 39 A.2d 546, 551-52 (1944).

Here, it was error to admit the challenged evidence because petitioner was not party to the previous civil suit, and hence had no opportunity to cross-examine the witness in those prior proceedings.

The admission of the prior testimony of John Gavin, Sr. was prejudicial error.

* * *

Certiorari should be allowed because the Appellate Court improperly and perfunctorily resolved all the important, constitutional questions synopsized above adversely to petitioner, without proper consideration of the questions raised. In addition to being deprived of the rights asserted in each of the above Points, petitioner was also thereby deprived of his right to meaningful appellate review. This Court should not permit his conviction to go unscrutinized in the face of these substantial allegations.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be allowed; and, upon consideration of the merits, petitioner's convictions should be reversed, or reversed and remanded.

Respectfully submitted,

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APPENDIX

APPENDIX A

Second Division
December 18, 1979

No. 61346

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

BENEDETTO J. MASSARELLA, BEE JAY'S TRUCK STOP, INC., and MIDEAST TRANSPORT, INC.,

Defendants-Appellants.

Appeal from the Circuit Court of Cook County
Honorable *Marvin E. Aspen,* Judge Presiding.

Mr. JUSTICE DOWNING delivered the opinion of the court:

On June 8, 1973, the Cook County grand jury returned a 49-count indictment for conspiracy, perjury, theft, and tax evasion against Benedetto J. Massarella (Massarella); Bee Jay's Truck Stop, Inc. (BJTS), a corporation of which Massarella was president and sole shareholder; Mideast Transport, Inc. (Mideast), a corporation controlled by Massarella; and several others. Prior to trial, all but five counts were dismissed. Massarella was found guilty by a jury of conspiracy, theft, and one count of perjury; sentenced to five years probation, including two years periodic imprisonment (for theft), and one to three years in the penitentiary (for perjury) both sentences to run concurrently; and ordered to pay a $10,000 fine and $425,407 in restitution to the state. BJTS was found

guilty of conspiracy and theft; Mideast was found guilty of conspiracy. BJTS and Mideast were each sentenced to pay a $10,000 fine and ordered to pay $425,407 in restitution to the State of Illinois.

On appeal from these judgments and sentences, the defendants raised the following 15 issues for our review: (1) whether the indictment should have been dismissed due to the Attorney General's participation in the proceedings; (2) whether the court erred in refusing to dismiss the perjury count; (3) whether the state sustained its burden of proving Massarella guilty of perjury; (4) whether the state sustained its burden of proving Massarella and BJTS guilty of theft; (5) whether the court erred in denying Massarella's motion for a substitution of judges; (6) whether the trial judge should have recused himself; (7) whether the trial court erred in denying the defendants' motion for a continuance; (8) whether the defendants were prejudiced by their joint trial on the conspiracy, theft, and perjury charges; (9) whether the defendants were denied a fair trial due to certain evidentiary rulings made by the trial court; (10) whether the defendants were denied a fair trial due to the prosecutor's closing argument; (11) whether the verdict forms finding Massarella and BJTS guilty of theft were sufficient; (12) whether the trial court adequately polled the jury upon the defendants' request; (13) whether the imposition of Massarella's two-year sentence of periodic imprisonment as a condition of five years probation was valid; (14) whether the trial court erred in imposing excessive and unlawful sentences upon all of the appealing defendants; and (15) whether Massarella was denied a fair hearing in aggravation and mitigation.

Finding that the indictment should have been dismissed due to the Attorney General's improper participation in the proceedings, we reversed the defendants' convictions

without deciding the remaining issues raised on the appeal. (*People* v. *Massarella* (1st Dist. 1977), 53 Ill. App. 3d 774, 368 N.E.2d 507.) The supreme court allowed the state's petition for leave to appeal (58 Ill. 2d R. 315), reversed our decision, and remanded the matter to us for consideration of the remaining unresolved issues (*People* v. *Massarella* (1978), 72 Ill. 2d 531, 382 N.E.2d 262).

The underlying facts giving rise to the 49-count indictment appear in our previous opinion (see 53 Ill. App. 3d 774, 775-78, 368 N.E.2d 507), and therefore will not be repeated here. Only those facts necessary to the resolution of the remaining 14 issues will be set forth as they are discussed in the opinion.

I.

Count 3 of the indictment charged Massarella individually with perjury committed on or about August 26, 1971 to one or about August 30, 1971, in a related civil proceeding brought by BJTS entitled *Bee Jay's Truck Stop, Inc.* v. *Illinois Department of Revenue,* case no. 71 CH 3608, in the circuit court of Cook County.[1] In 1971, the statute prescribing the penalty for perjury provided that:

> "A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned." (Ill. Rev. Stat. 1971, ch. 38, par. 32-2.)

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[1] The disposition of BJTS's appeal from the decision in that proceeding appears in *Bee Jay's Truck Stop* v. *Dept. of Revenue* (1st Dist. 1977), 52 Ill. App. 3d 90, 367 N.E.2d 173, *cert. denied,* 435 U.S. 970, 56 L. Ed. 2d 61, 98 S. Ct. 1610.

Due to the presence of the alternative penalty of imprisonment other than in the penitentiary in 1971, perjury was classified as a misdemeanor. (See *People* v. *Novotny* (1968), 41 Ill. 2d 401, 403, 244 N.E.2d 182.) The statute of limitations for all misdemeanors at that time was 18 months. (Ill. Rev. Stat. 1971, ch. 38, par. 3-5.) The indictment against Massarella was returned on June 8, 1973, approximately 22 months after the perjury was allegedly committed.

However, the Unified Code of Corrections took effect on January 1, 1973, approximately one month before the 1971 18-month statute of limitations expired in February 1973. (Ill. Rev. Stat. 1973, ch. 38, par. 1008-6-1.) The Unified Code reclassified perjury as a Class 3 felony (Ill. Rev. Stat. 1973, ch. 38, par. 32-2(d)) carrying a maximum term in excess of one year and not exceeding ten years (Ill.Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(4)), and extended the statute of limitations for perjury to three years (Ill. Rev. Stat. 1973, ch. 38, par. 3-5(b)). Therefore, under the Unified Code, the indictment charging Massarella with perjury committed in 1971 was timely brought.

Massarella contends that the reclassification of perjury from a misdemeanor to a felony as applied to him violates the *ex post facto* laws of the Illinois and Federal constitutions. (Ill. Const. 1970, art. I, §16; U.S. Const., art. I, §9.) From this premise, Massarella argues that the indictment was barred by the 18-month statute of limitations in force in 1971, and, therefore, the trial court erred in refusing to dismiss the perjury count.

A legislative body can extend the period of limitations as to criminal offenses which occurred prior to the effective date of the change without violating the constitutional prohibitions against *ex post facto* laws, so long as the extended period does not apply to any case in which the

accused has acquired, as of the effective date of the change, a right to acquittal through the running of the original statute. (*People* v. *Anderson* (1973), 53 Ill. 2d 437, 440, 292 N.E.2d 364.) In *People* v. *Liebling* (1st Dist. 1976), 36 Ill. App. 3d 1073, 344 N.E.2d 520, this court held that the legislature's reclassification of conspiracy and bribery from misdemeanors to felonies prior to the expiration of the 18-month statute of limitations and the extension of that statute of limitations to three years did not violate the *ex post facto* doctrine. (*Liebling, supra* at 1077.) However, Massarella argues that *Liebling* is inapplicable because there the defendant did not argue that the very change in the nature of the offense was barred by the *ex post facto* doctrine. We disagree.

Since Massarella's trial occurred subsequent to the effective date of the Unified Code of Corrections, he was entitled to be sentenced either under the law in effect at the time of the offense or the law at the time of the trial. (See *Liebling, supra* at 1076.) Massarella elected to be sentenced under the Unified Code of Corrections and received a sentence of one to three years in the penitentiary. The constitutional prohibition against *ex post facto* laws is not violated if the defendant is given the option of being sentenced in accordance with the law as it exists at the time of sentencing or as it existed when the offense was committed. (See *Liebling, supra* at 1076-77.) Moreover, although it is the general rule that punishment for an offense cannot be increased by an amendatory act taking effect after the offense has been committed without violating the *ex post facto* doctrine (*People* v. *Wyckoff* (2nd Dist. 1969), 106 Ill. App. 2d 360, 364, 245 N.E.2d 316), the criterion for determining the lesser penalty is the actual term of imprisonment imposed (*People* v. *Zboralski* (3rd Dist. 1975), 33 Ill. App. 3d 912, 913, 338 N.E.2d 925). Massarella's sentence of one to three years in the peni-

tentiary did not exact a penalty greater than that permissible under the 1971 statute classifying perjury as a misdemeanor.

For the foregoing reasons, we find that the trial court did not err in refusing to dismiss the perjury indictment against Massarella.

II.

During the course of the aforementioned civil proceeding wherein Massarella sought to enjoin the Department of Revenue from investigating him individually and his business BJTS, Massarella testified that he had bought no diesel fuel from co-defendant Mid-Town Petroluem, Inc. (Mid-Town)[2] prior to January 1971, and that up to December 1970, all of this diesel fuel was supplied by Humble Oil Company. He further testified that he never made purchases of diesel fuel through Rella Enterprises, a sole proprietorship which Massarella owned. Count 3 of the indictment charged that these statements were perjurious. The perjury statute defined the offense as one in which a person under oath at a proceeding makes a false statement material to the issue or point in question, which he does not believe to be true. (Ill. Rev. Stat. 1971, ch. 38, par. 32-2(a).) Massarella contends that the evidence of perjury was insufficient absent any showing that his statements were material, absent proof of falsity, and absent proof of his state of mind. We disagree.

Materiality is a question of law for the court to decide. (*People* v. *Berry* (1923), 309 Ill. 511, 515, 141 N.E. 132.) However, there is no authority to support the defendant's novel suggestion that, to permit meaningful appellate review, the trial court must make a finding of materiality.

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[2] Co-indictee Mid-Town pleaded guilty to conspiracy to commit theft.

An indictment may show the materiality of the testimony on which the perjury is assigned either by setting forth the issue and the sworn statement, or by stating the particular testimony charged to be false, with the allegation that such testimony is material. *People* v. *Berry, supra* at 513-14.

Contrary to Massarella's sole contention with respect to the sufficiency of the evidence showing the materiality of his allegedly perjurious statements, a certified and exemplified copy of the pleadings and orders in *Bee Jay's Truck Stop, Inc.* v. *Illinois Department of Revenue,* case no. 71 CH 3608, as well as the entire transcript from those proceedings, was received into evidence without objection and upon stipulation of the parties. The issue in the civil proceeding was whether there was a factual basis for the Department's investigation of Massarella's alleged theft and evasion of state motor fuel tax through the diversion of untaxed diesel fuel to BJTS. We therefore further find that the trial court had before it sufficient evidence to properly determine that Massarella's statements were material to the issue of Massarella's alleged guilt of theft. *Cf. People* v. *Harris* (5th Dist. 1968), 102 Ill. App. 2d 335, 242 N.E.2d 782.

The perjury statute also required the state to prove that these statements were false. (See Ill. Rev. Stat. 1971, ch. 38, par. 32-2(a).) Relying on *Bronston* v. *United States* (1973), 409 U.S. 352, 34 L. Ed. 2d 568, 93 S. Ct. 595, Massarella contends that his testimony was at most evasive, unresponsive, or untrue only by false negative implications, but were not false. In *Bronston,* the Supreme Court held that the federal perjury statute does not reach a statement that is literally true and complete, but unresponsive, even if the witness intended to mislead the court. (*Bronston, supra* at 357-62.) Massarella contends that the Illinois perjury statute should be interpreted as

the federal perjury statute has been interpreted. We need not determine that question for the record of the civil proceeding shows that the questions posed to Massarella and his answers thereto were clear, concise, and direct. Moreover, in the instant trial, Raymond Battersby,[3] the president and principal shareholder of Mid-Town, testified that pursuant to an agreement personally solicited by Massarella in the summer of 1967, Mid-Town sold Massarella and BJTS several million gallons of diesel fuel from August 1967 to December 1970. Battersby also admitted that he lied in the civil proceeding when he denied selling untaxed diesel fuel to BJTS. James Peterson of the Peterson Oil Company testified that he sold Massarella and Rella Enterprises several million gallons of diesel fuel from February 1969 to May 1971. Gino Fortuna and Earl Pruitt, employees of Massarella and BJTS, and Louis Wright, testified that this fuel was delivered to BJTS. A comparison of this and other testimony presented in the state's case with Massarella's testimony in the civil proceeding shows that his testimony was neither unresponsive nor literally true, but rather was patently false. In light of the patent falsity of his testimony, there can be little doubt that Massarella knew his testimony to be false.

III.

Count 6 of the indictment charged BJTS, a corporation, and Massarella, individually and as president of BJTS, with the theft of motor fuel tax monies of the State of Illinois in excess of $150, committed from June 11, 1970 to May 31, 1971. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)-(1).) These defendants contend that the state failed to sustain its burden of proving them guilty of this offense.

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[3] Co-indictee Battersby pleaded guilty to conspiracy to commit theft and to perjury.

It is uncontroverted that the county in which the alleged crime was committed is a material averment and must be proved beyond a reasonable doubt. (*People* v. *White* (1st Dist. 1975), 26 Ill. App. 3d 659, 661, 325 N.E.2d 313.) The indictment charged that the defendants' theft of the state tax monies occurred in Cook County. The defendants first contend that since the alleged offense was exactly comparable to embezzlement, venue could properly lie only in Sangamon County, Illinois, the site of the state capitol and the office of the Department of Revenue of the State of Illinois. (See *People* v. *Kopman* (1934), 358 Ill. 479, 485, 193 N.E. 516.) We find the defendants' argument to be without merit insofar as they were neither charged with embezzlement nor with the violation of the Motor Fuel Tax Law. (Ill. Rev. Stat. 1971, ch. 120, pars. 417-434.)[4] Rather, the defendants were charged with the separate and distinct offense of theft. A person who commits theft of property may be tried in any county in which he exerted control over such property. (Ill. Rev. Stat. 1971, ch. 38, par. 1-6(g).) Venue, like other facts necessary to prove the commission of an offense, may be established by circumstantial evidence. *People* v. *Allen* (1952), 413 Ill. 69, 76, 107 N.E.2d 826.

The evidence shows that the defendants obtained several million gallons of tax-free motor fuel, that BJTS had six diesel pumps which pumped diesel fuel into diesel tractors, and that the charge that was made at all six pumps included motor fuel tax. The evidence further shows that

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[4] We note that venue in Cook County for a violation of the Motor Fuel Tax Law may be shown by proof that the Department of Revenue maintained an office for the payment of state motor fuel tax in Cook County. (See *People* v. *Allen* (1935), 360 Ill. 36, 42-43, 195 N.E. 478.) An accountant for the Department of Revenue responded affirmatively when asked, "Does this Illinois Department of Revenue maintain office payments [*sic*] of state motor fuel taxes in Cook County?"

in 1970 the diesel pumps at BJTS displayed a decal which stated that Illinois motor fuel tax of 7½ cents per gallon was included in the cost of the product. When the Illinois motor fuel tax increased from 6 cents to 7½ cents per gallon in 1969, the pump price of the diesel fuel at BJTS increased from 24 cents to 25½ cents per gallon. BJTS was located at 970 Pershing Road in Chicago, Cook County, Illinois, and was licensed by the City of Chicago. We are of the opinion that the only rational conclusion that can be drawn from the evidence is that the defendants obtained and exerted control over the state motor fuel tax monies in Cook County as alleged in the indictment. (See *People* v. *Mowry* (1955), 6 Ill. 2d 132, 139-40, 126 N.E.2d 683.) Venue was properly established, and we are satisfied that the state's burden of proof of theft was sustained beyond a reasonable doubt.

IV.

On June 12, 1973, Massarella appeared before the presiding judge of the criminal division for arraignment and pleaded not guilty to the charges in the indictment. On June 15, 1973, the remaining defendants were arraigned and the cause was assigned to the Honorable Marvin E. Aspen and continued to July 18, 1973, on which date Massarella filed a written verified motion supported by his affidavit for a substitution of judges pursuant to Ill. Rev. Stat. 1973, ch. 38, par. 114-5. The next day the court ruled initially that the motion was not timely filed within 10 days of being placed on the trial call as provided by statute (Ill. Rev. Stat. 1973, ch. 38, par. 114-5(a)), so as to entitle defendant to an automatic order of substitution of judges, but permitted the motion to be amended as one pursuant to subsection (c), and proceeded to hold a hearing on the merits of the amended motion. Massarella assigns error to the court's initial ruling as to the timeli-

ness of the first motion and its denial of the amended motion.

Section 114-5 of the Criminal Code provides in pertinent part:

> "(a) Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of judge or any 2 judges on the ground that such judge or judges are so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another court or judge not named in the motion.
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> (c) [A]ny defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion the court shall conduct a hearing and determine the merits of the motion." (Ill. Rev. Stat. 1973, ch. 38, par. 114-5.)

Early cases interpreting this statute held that to obtain a mandatory substitution of judges under section 114-5(a), a defendant must file a motion alleging prejudice within ten (10) days after the case has been placed on the trial judge, and that a case is on the trial call of the trial judge when it is so assigned. (See *People* v. *Wolfe,* (1st Dist. 1970), 124 Ill. App. 2d 349, 354, 260 N.E.2d 424; *People* v. *Ethridge* (1st Dist. 1966), 78 Ill. App. 2d 299, 302, 223 N.E.2d 437.) However, more recent cases have liberally interpreted this statute—so as to permit rather than deny a substitution—to hold that such motion is timely filed under this section when filed within 10 days of the date the defendant could be charged with knowledge of the assignment of the case to the trial judge. See *People* v. *Thomas* (1st Dist. 1978), 58 Ill. App. 3d

460, 462, 374 N.E.2d 795; *People* v. *Oatis* (1st Dist. 1979), 69 Ill. App. 3d 736, 741, 387 N.E.2d 1052.

Massarella does not contend that he first had knowledge of the assignment of the case to Judge Aspen on July 18, 1973, but rather contends that the motion should have been allowed as of right since it was filed on the first date the case was before Judge Aspen, and before the judge had made any substantive rulings in the case. (*People* v. *Kostos* (1961), 21 Ill. 2d 451, 173 N.E.2d 469; *People* v. *Howell* (5th Dist. 1974), 16 Ill. App. 3d 989, 993, 307 N.E.2d 172, *aff'd* 60 Ill. 2d 117, 324 N.E.2d 403; *People* v. *Evans* (4th Dist. 1971), 1 Ill. App. 3d 158, 273 N.E.2d 71.) It is clear that a motion for the substitution of judges filed after the court has ruled on a substantive issue in the case is untimely because to hold otherwise would allow counsel to first ascertain the attitude of the trial judge on the hearing on that substantive issue, and then to assert the court's adverse judgment on that issue as a ground for allowing the substitution. (See *People* v. *Chambers* (1956), 9 Ill. 2d 83, 89, 136 N.E.2d 812, *cert. denied,* 359 U.S. 972, 3 L. Ed. 2d 839, 79 S. Ct. 888 (construing Ill. Rev. Stat. 1953, ch. 146, pars. 21, 25, 26 and cited in *Evans* and *Kostos, supra*); *Howell, supra* at 993.) However, the cases cited by the defendant do not support his argument that the converse of this rule extends the time for filing the motion, *i.e.,* that the motion may be filed at any time, regardless of when the defendant could be charged with knowledge of the assignment of the case to the trial judge, as long as it was filed before a substantive issue had been ruled on.

Relying on *Chambers, supra,* and *People* v. *Norcutt* (1970), 44 Ill. 2d 256, 255 N.E.2d 442, the defendant in *People* v. *Bean* (1st Dist. 1974), 17 Ill. App. 3d 377, 308 N.E.2d 334, made the same argument that Massarella urges. There, we said:

> "The *Norcutt* and *Chambers* cases are the culmination of a long series of Illinois decisions which by judicial interpretation engrafted an exception onto our present and preceding statutes dealing with mandatory substitution of judges. These cases in effect hold that a motion for a mandatory substitution of judges not only must be made within the time period provided by statute but must also be made prior to the trial court's indicating in any way its views as to the merits of the case. The defendant, by isolating the judicial exception to the time provision of subsection (a), attempts the argument that a restrictive exception to the general rule is in fact a liberalization of it. Such a reading of *Norcutt* and *Chambers* flies in the face of the plain language of the statute. * * * The denial of that portion of the defendant's motion as untimely was fully justified." (*Bean, supra* at 381.)

We agree with the foregoing interpretation of section 114-5(a), and, therefore, find that the denial of Massarella's motion made pursuant to that section was proper.

Alternatively, Massarella contends that the court erred in not granting the motion for cause under section 114-5(c). The defendant contends that the "astronomical figures" involved in the case, the Honorable Samuel B. Epstein's statement in the civil proceeding that he might have granted the defendant's injunction against the Department of Revenue if the state were not a party, and Judge Aspen's prior recusal from a case involving a politically prominent public official and his pending re-election, constituted reasonable grounds not only for the defendant to fear that he could not get a fair trial before Judge Aspen, but also for the judge to grant the motion even if he candidly believed he could and would be fair.

It is clear that the mere fact that the defendant fears that a judge is prejudiced against him is insufficient cause to grant a motion for substitution. (See *People* v. *Peter* (1973), 55 Ill. 2d 443, 458, 303 N.E.2d 398, *cert. denied,* 417 U.S. 920, 41 L. Ed. 2d 225, 94 S. Ct. 2627.) The statements attributed to Judge Epstein are not to be found in the record. Nor does the record establish the basis for the alleged "political" theory. The only reference before the court in July 1973 when the motion was denied as to the dollar amounts in issue was that they exceeded $150. Under these circumstances, we find the evidence insufficient to support the defendant's charge of prejudice warranting a substitution of judges.

V.

Massarella next argues that in the course of accepting guilty pleas from three co-defendants prior to trial, the trial judge necessarily heard factual reasons for the pleas which caused a bias and prejudice against him. He therefore contends that the trial judge erred in failing to recuse himself *sua sponte.*

While it cannot be disputed that in a criminal trial a judge's hostile attitude toward the defendant, or his witnesses, is apt to prejudicially influence the jury in arriving at its verdict (see *People* v. *Marino* (1953), 414 Ill. 445, 111 N.E.2d 534), and that it may be better for a judge to recuse himself when he learns that a plea of guilty has been offered (*United States* v. *Walker* (D.C. Cir. 1972), 473 F. 2d 136, 138), a trial judge is under no duty to recuse himself even from a bench trial because he presided at the trial of co-defendants (see *People* v. *Smith* (1965), 32 Ill. 2d 88, 93-94, 203 N.E.2d 879; *People* v. *Smith* (1st Dist. 1975), 29 Ill. App. 3d 519, 331 N.E.2d 99, *cert. denied,* 424 U.S. 925, 47 L. Ed. 2d 334, 96 S. Ct. 1137

(abst.)), or even because he presided at a prior trial of the same defendant in the same cause (see *United States* v. *Dichiarinte* (7th Cir. 1971), 445 F. 2d 126, 132).

Moreover, the alleged bias or prejudice of a trial judge to be disqualifying must be shown to have stemmed from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (*United States* v. *Grinnell Corp.* (1966), 384 U.S. 563, 583, 16 L. Ed. 2d 778, 86 S. Ct. 1698.) In the instant case there is no affirmative showing that the trial judge considered information gleaned from the co-defendants' plea hearings during the course of Massarella's trial. (See *People* v. *Teller* (1st Dist. 1977), 45 Ill. App. 3d 410, 417, 359 N.E.2d 803.) The alleged erroneous rulings and findings made by the trial judge in the course of the trial asserted by Massarella are not in themselves sufficient reasons to believe that the judge had a personal bias or prejudice for or against him (see *United States* v. *English* (7th Cir. 1974), 501 F. 2d 1254, 1263, *cert. denied,* 419 U.S. 1114, 42 L. Ed. 2d 811, 95 S. Ct. 791), for due process of law is not a guaranty against erroneous rulings or decisions (*People* v. *Hicks* (1970), 44 Ill. 2d 550, 557, 256 N.E.2d 823, *cert. denied,* 400 U.S. 845, 27 L. Ed. 2d 81, 91 S. Ct. 90). In the absence of any further evidence to support the defendant's charge of prejudice and bias, we cannot say that the trial court erred in failing to recuse himself, or that his failure to do so deprived the defendant of a fair trial in accordance with due process of law.

VI.

In October 1974, three days after several co-indictees and their respective corporations pleaded guilty, Massarella sought to discharge his two privately-retained counsel, Bernard Brody and Sidney Goldstein, who had rep-

resented the defendant in the matter since the arraignment in June of 1973. Massarella sought to substitute Junie Sinson, an attorney whom he had first contacted 48 hours before. When Mr. Sinson appeared in court on October 18, 1974, he indicated that due to the complexity of the case he could not substitute unless he were granted a continuance to prepare. Neither Brody nor Goldstein moved to withdraw, moved for a continuance, nor represented to the court that the co-defendants' guilty pleas had so altered the case that they were not prepared to go to trial. The trial date of October 15, 1974 had been set by the court on May 23, 1974 to enable counsel to prepare for trial, to allow both counsel and the court to clear their calendars, and to enable the state to issue interstate witness subpoenas. In light of these factors the trial court agreed to permit Sinson to file an appearance, but denied his motion for a continuance. Sinson filed no appearance, and Brody and Goldstein continued to represent the defendants throughout the plea negotiations and the trial which began on October 21. The defendant contends that the court, in denying his motion for a continuance and thus preventing the substitution of counsel, deprived him of his constitutional right to the effective assistance of counsel of his choice.

While we do not dispute that the constitutional right to counsel is fundamental and necessarily includes the right to counsel with adequate time to prepare (see *Gideon* v. *Wainwright* (1963), 372 U.S. 335, 342-43, 9 L. Ed. 2d 799, 83 S. Ct. 792; *People* v. *Blumenfeld* (1928), 330 Ill. 474, 489, 161 N.E. 857; *People* v. *Miller* (1st Dist. 1971), 131 Ill. App. 2d 212, 217, 268 N.E.2d 213), the defendant's right to counsel of his own choosing is not absolute, and a substitution of counsel may be denied if it will unduly prejudice the opposing party or interfere with the prompt administration of justice by inordinately delaying the trial

(see *People* v. *McNeil* (1972), 53 Ill. 2d 187, 197-98, 290 N.E.2d 602). Moreover, the granting of a continuance to permit a substitution of counsel for preparation for a case necessarily depends on the particular facts and circumstances surrounding the request, and is a matter resting within the sound judicial discretion of the trial court. (*People* v. *Surgeon* (1958), 15 Ill. 2d 236, 239, 154 N.E.2d 253; *People* v. *Clark* (1956), 9 Ill. 2d 46, 49, 137 N.E.2d 54, *cert. denied,* 352 U.S. 1002, 1 L. Ed. 2d 546, 77 S. Ct. 559.) A trial court's refusal to grant a motion for a continuance will ordinarily not be disturbed on appeal without some showing of a clear abuse of discretion. (*People* v. *Hayes* (1972), 52 Ill. 2d 170, 175, 287 N.E. 2d 465; *People* v. *Brooks* (4th Dist. 1976), 39 Ill. App. 3d 983, 986, 350 N.E.2d 821.) Unless it appears that the refusal to grant a continuance embarrassed the defendant in preparing his defense or prejudiced his rights, the conviction should be affirmed. *People* v. *Canaday* (1971), 49 Ill. 2d 416, 427, 275 N.E.2d 356; *People* v. *Allen* (5th Dist. 1976), 35 Ill. App. 3d 342, 347, 341 N.E.2d 431.

The record in the instant case does not reflect that Massarella ever expressed any dissatisfaction with his two privately-retained counsel who had represented him since the inception of the case. Although a large portion of the state's case rested on co-defendant Battersby's testimony who had pleaded guilty to conspiracy to commit theft and to perjury, neither of the defendant's retained counsel asserted at trial that either his plea or his subsequent testimony so altered the case that they were not prepared to proceed. Nor is there anything in the record to support the defendant's fear that his counsel may have inadvertently divulged matters concerning his defense to counsel for the guilty-pleaing co-defendants. On the other hand, given Mr. Sinson's apparent unfamiliarity with this

complex trial which the trial court expected to last for over two months, the length of the continuance needed for Mr. Sinson's preparation would have inordinately delayed an already lengthy trial and would have forced the state to re-issue 15 interstate witness subpoenas. Although we recognize that the protection of the defendant's rights are paramount to the efficient administration of justice, we do not believe that the record shows that the defendant's rights were in any way prejudiced by the trial court's denial of the continuance. Therefore, we find no clear showing that the trial court abused its discretion in denying the defendant's motion.

VII.

Massarella next contends that the trial court erred in denying his motion to sever the perjury counts from the remaining counts for trial pursuant to Ill. Rev. Stat. 1973, ch. 38, par. 114-8. We have previously determined that the trial court did not err in refusing to dismiss the perjury counts. However, Massarella also contends that the joinder of the perjury count with the conspiracy and theft counts (1) eliminated the possibility of his choosing to testify on less than all of the charges (*Cross* v. *United States* (D.C. Cir. 1964), 335 F. 2d 987); (2) adversely affected the credibility of his testimony due to the fact that the jurors were aware that the grand jury believed he had lied under oath on two previous occasions;[5] and (3) prejudiced his rights due to the fact that the jurors heard evidence of several distinct offenses at a single trial (*United States* v. *Carter* (D.C. Cir. 1973), 475 F.2d 349; *Drew* v. *United States* (D.C. Cir. 1964), 331 F. 2d 85).

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[5] Massarella was found not guilty of one charge of perjury.

As to Massarella's first contention, we note that his severance motions at trial made no reference to a desire to testify on less than all of the charges, or that his testimony on the perjury charge would self-incriminate him on the remaining charges. (*Cf. Cross, supra* at 990.) No need for a severance exists until the defendant makes a convincing showing that he had both important testimony to give concerning one count and a strong need to refrain from testifying on the other counts, because in the absence of such a showing, the court is unable to determine if the claim is genuine and to intelligently weigh the considerations of economy and expedition of judicial administration against the defendant's interest in having a free choice with respect to testifying. (*Baker* v. *United States* (D.C. Cir. 1968), 401 F. 2d 958, 977, *cert. denied* 400 U.S. 965, 27 L. Ed. 2d 384, 91 S. Ct. 367.) Defendant's failure to specifically set forth this ground for severance before the trial court precludes him from raising it in this court. See *People* v. *Jackson* (1st Dist. 1972), 4 Ill. App. 3d 698, 702-03, 281 N.E.2d 373.

The defendant cites no authority for his second contention that the trial court's refusal to grant a severance of the charges was prejudicial because the petit jurors were aware that the grand jurors had believed that he had lied under oath on two other occasions. However, this same argument was raised and rejected by the courts in *United States* v. *Pacente* (7th Cir. 1974), 503 F. 2d 543, *cert. denied,* 419 U.S. 1048, 42 L. Ed. 2d 642, 95 S. Ct. 623, and *United States* v. *Isaacs* (7th Cir. 1974), 493 F. 2d 1124, *cert. denied,* 417 U.S. 976, 41 L. Ed. 2d 1146, 94 S. Ct. 3183-84. As in *Isaacs,* defendant Massarella voluntarily appeared in the suit instituted by him in which he allegedly gave the perjurious testimony. That testimony related to Massarella's involvement in the scheme to divert tax

monies from the state through the sale of untaxed diesel fuel. The perjury, conspiracy, and theft charges all have a logical relationship to that scheme. On the basis of the foregoing cases and facts, we reject the defendant's second contention. See *Pacente, supra* at 545-49; *Isaacs, supra* at 1159-60.

It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit another crime, from which the jury may infer that the defendant committed the crime charged. (1 Wigmore, Evidence §192-94 (3d Ed. 1940); McCormick, Evidence §157.) The defendant contends that the joinder of the perjury charge with the remaining charges improperly permitted evidence of the former charge to be heard by the jury, and that such evidence prejudiced his rights. However, as stated by the court in *Drew, supra*:

> "If, * * *, the evidence of each of the crimes on trial would be admissible in a separate trial for the other, the possibility of 'criminal propensity' prejudice would be in no way enlarged by the fact of joinder. When, for example, the two crimes arose out of a continuous transaction or the same set of events, the evidence would be independently admissible in separate trials." (*Drew, supra* at 90.)

Evidence of other crimes is admissible when relevant to prove motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that the proof of one tends to establish the other. (*Drew, supra* at 90.) Massarella instituted the civil proceeding to enjoin the Department of Revenue from investigating his activities and those of BJTS. It is clear from the record of that proceeding that the Department's investigation related to the theft and evasion of state motor fuel tax. It was in that proceeding that Massarella perjured himself when testi-

fying as to the sources of his diesel fuel prior to 1970 and as to his purchase of such fuel through Rella Enterprises. We are of the opinion that this perjurious testimony was admissible to show a particular plan or scheme by which the conspiracy and theft offenses were committed. We also believe that this evidence tends to prove the absence of mistake or inadvertence in committing the subsequent offenses, for if such had been the case Massarella would have had no reason to perjure himself. For the foregoing reasons, we find no error in the trial court's refusal to grant the defendant's motion for severance of the charges.

VIII.

Defendants next contend that they were deprived their constitutional rights to a fair trial in accordance with due process of law and to confront the witnesses against them where the court: (1) limited the evidence sought to be presented by a defense expert witness, (2) excluded evidence of conversations between defendant Massarella and his accountant, (3) applied the best evidence rule to exclude some of the defense's evidence, (4) limited the cross-examination of four of the state's witnesses, (5) allowed into evidence the statements of an alleged co-conspirator, and (6) allowed into evidence the testimony of a deceased witness given at the prior civil proceeding. Having carefully reviewed the record and the authorities cited by the defendants, we find no merit in these contentions and no necessity to discuss them here.

IX.

The defendants also complain of the prosecutor's reference in his closing argument to the defendants' failure to call two witnesses and the court's ruling on the defendants' objections thereto, of the verdict forms for the theft charges, and of the manner in which the jury was polled.

The record shows that the defendants invited the prosecutor's explanation of the absence of the witnesses and of the defendants' ability to call them. Therefore, we find that the prosecutor's argument was within proper bounds. (See *People* v. *McElroy* (1964), 30 Ill. 2d 286, 291-92, 196 N.E.2d 651; *People* v. *Wheeler* (1955), 5 Ill. 2d 474, 485-86, 126 N.E.2d 228.) Furthermore, the verdict form proffered by the state, without objection by the defendants, was I.P.I. Criminal Instruction No. 26.05. Since Supreme Court Rule 451 (Ill. Rev. Stat. 1973, ch. 110A, par. 451) prescribes the use of the applicable I.P.I. criminal instruction where possible, we find no merit in the defendants' second complaint. (See *People* v. *Padget* (3rd Dist. 1974), 21 Ill. App. 3d 426, 430, 315 N.E.2d 646.) Finally, there is nothing in the record to show that the defendants or their attorneys objected at trial to the manner in which the jury was polled, or sought a more extensive poll. Moreover, the juror's responses indicate that there was no hint of dissent from the verdicts, although the questions posed to the jurors gave them ample opportunity to do so. Under these circumstances, we do not believe the trial court abused its discretion in polling the jury as it did.

X.

Illinois Revised Statutes 1973, ch. 38, par. 1005-4-1 states in pertinent part:

> "(a) After a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court *shall*:
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> * * *
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> (3) *consider* evidence and information offered by the parties in aggravation and mitigation; * * *." (Emphasis added.)

On January 8, 1975, following the jury's finding of guilt, the trial court held a hearing on aggravation and mitigation in which defendant Massarella presented evidence in mitigation. At the conclusion of the hearing, the trial judge presented counsel with a lengthy written sentencing memorandum order dated January 8, 1975. Defendant Massarella now contends that due to the alleged prior preparation of the sentencing order, the trial court did not consider the evidence presented in mitigation by the defendant.

At the outset we note that Massarella failed to object to this procedure in the trial court. Therefore, he is deemed to have waived his right to assert any prejudice on appeal. (See *People* v. *Dixon* (1st Dist. 1971), 2 Ill. App. 3d 279, 284, 276 N.E.2d 42.) However, even assuming that defendant's argument was properly before this court, our review of the record does not persuade us that the trial court did not in fact consider the evidence presented in the hearing on mitigation. During the hearing the trial judge stated that he had considered carefully letters of recommendation and had reviewed carefully the background of the defendant which he gleaned "not only during the course of the trial but also as part of the pre-sentence reports as part of Mr. Rocco's hearing presentation on mitigation." The order contains a thorough, reasoned statement of the sentences as to each defendant and the grounds for them. Handwritten additions and changes were made on the order. The defendant has presented no other evidence, other than the date on the order, to support his contention that the trial judge did not consider the evidence in mitigation. Under these circumstances, we find no basis to support his contention.

XI.

For the crime of theft, Massarella was sentenced to five years probation, two years periodic imprisonment, the payment of a $10,000 fine, and the payment of $427,407 restitution to the State of Illinois. He was ordered to serve his sentence of periodic imprisonment in the Cook County Department of Corrections where he was to be incarcerated, "provided that he may be released for short periods of time on petition of this Court in order that he may take steps to facilitate the restitution terms of this order." Massarella was further ordered to commence immediately to sell his business assets in order to pay the restitution and fine. Massarella contends that (1) his sentence of two years periodic imprisonment as a condition of five years probation was an impermissible imposition of two years incarceration, and (2) that under Ill. Rev. Stat. 1973, ch. 38, par. 1005-7-1 periodic imprisonment could not be imposed along with an indeterminate penitentiary sentence of one to three years for perjury.

As to the defendant's first contention, it is clear that the trial court had the authority to require Massarella to serve a term of periodic imprisonment as a condition of probation. (See the Unified Code of Corrections (UCC), Ill. Rev. Stat. 1973, ch. 38, par. 1005-6-3(b)(1).) A sentence of periodic imprisonment is a sentence of imprisonment during which the committed person may be released for periods of time during the day or night, or for periods of days, or both. (UCC, sec. 1005-7-1(a).) Such a sentence of periodic imprisonment may be imposed to permit the defendant to conduct a business or for any other purpose determined by the court. (UCC, sec. 1005-7-1(b)(3)(7).) We find the trial court's sentence of periodic imprisonment to be consonant with the foregoing provisions of the UCC.

Section 5-7-1 follows and expands the former work release statute for Illinois jails. (Ill. Rev. Stat. 1971, ch. 75, pars. 35 to 41 (repealed); see Council Commentary, Ill. Rev. Stat. 1973, par. 1005-7-1.) While under the former law only misdemeanants were allowed work release status, subparagraph (c) of section 5-7-1 also permits periodic imprisonment to be imposed for a felony. Subparagraph (c) also provides that, "The court shall not impose a sentence of periodic imprisonment if it imposes a sentence of imprisonment upon the defendant." Without other citation of authority, the defendant contends that this section of the Code precludes the imposition of periodic imprisonment for the offense of theft in addition to the indeterminate penitentiary sentence of one to three years for the offense of perjury. We disagree.

Although our research has revealed no cases dealing with this precise issue, several other sections of the Code persuade us that the defendant's construction of section 5-7-1 is erroneous. Section 5-7-2 dealing with the modification and revocation of a sentence of periodic imprisonment provides that:

> "That part of the term under paragraph (d) of Section 5-7-1 which has been served under the sentence of periodic imprisonment shall be credited against a sentence of imprisonment." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-7-2.)

Moreover, sections 5-7-8 provides that:

> "(a) The service of an indeterminate sentence of imprisonment shall satisfy any sentence of periodic imprisonment which was imposed on an offender for an offense committed prior to the imposition of the indeterminate sentence. An offender who is serving a sentence of periodic imprisonment at the time an in-

> determinate sentence of imprisonment is imposed shall be delivered to the custody of the Department of Corrections to commence service of the indeterminate sentence immediately." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-7-8.)

These sections of the Code allowing the crediting and merger of a periodic sentence of imprisonment into a sentence of imprisonment suggest to us that the imposition of a sentence of periodic imprisonment for one offense and a sentence of imprisonment for another distinct and separate second offense is permissible. Therefore, we believe that section 5-7-1(c) must be construed only to preclude the imposition of a sentence of periodic imprisonment and a sentence of imprisonment for a single offense. Since in the instant case the sentence of periodic imprisonment was imposed as a condition of probation for the offense of theft and the indeterminate penitentiary sentence of one to three years was imposed for the defendant's perjury conviction, we find section 5-7-1(c) inapplicable and the defendant's argument without merit.

XII.

Defendant Massarella urges that the trial court was without authority to order restitution of $425,407 as a condition of his probation for theft, and that his one to three year penitentiary sentence for perjury was excessive and inconsistent considering his background and the sentence of three years conditional discharge and $1,000 fine imposed on co-defendant Battersby upon his plea of guilty to perjury.

As to Massarella's first contention, we find his reliance on federal income tax evasion cases misplaced insofar as he was convicted of theft, not tax evasion. Moreover,

section 5-6-3(b)(10) of the UCC expressly empowers the court to make as a condition of probation the "restitution or reparation in an amount not to exceed actual loss or damage to property and pecuniary loss * * * [and to] determine the amount and conditions of payment." A review of the record and exhibits introduced shows that the amount of disputed tax monies was subject to accurate computation and that the evidence supported the specific amount of restitution ordered.

Massarella was sentenced to one to three years in the penitentiary and fined $10,000 for perjury while co-defendant Battersby received a sentence of three years conditional discharge and a $1,000 fine. Massarella contends that this disparity of the sentences imposed demonstrates that he was punished for proceeding to trial rather than joining Battersby in his guilty plea. We find this claim without merit.

A reviewing court should not disturb a sentence within the statutory range on the mere allegation that it was imposed because a defendant demanded a trial. (*People* v. *Perry* (1971), 47 Ill. 2d 402, 408, 266 N.E.2d 330.) That fact must be clearly established by evidence and should not be inferred merely because a defendant received a higher sentence than a defendant who pleaded guilty. (*People* v. *Perry, supra* at 408-09.) Mere disparity between the sentences imposed on Massarella, who stood trial, and Battersby, who pleaded guilty, does not of itself require action by this court. (See *People* v. *Martin* (1970), 47 Ill. 2d 331, 339, 265 N.E.2d 685, *cert. denied,* 403 U.S. 921, 29 L. Ed. 2d 700, 91 S. Ct. 2240.) It is the reason for the disparity that is controlling. *People* v. *Martin, supra.*

A disparity in sentences is appropriate where the defendant receiving the more severe sentence was the moving

force in the commission of the crime. (See *People* v. *Martin, supra.*) Both Massarella and Battersby were convicted of perjury for their testimony in the injunction suit initiated by BJTS of which Massarella was president and the sole shareholder. Massarella testified without subpoena and his testimony extended over four days and consumed nearly one-half of the entire hearing. On the other hand, Battersby testified only briefly after being subpoenaed by Massarella's attorney. Thus, we conclude that Massarella was the moving force in the commission of the crimes of perjury.

Moreover, it is proper for a trial court to grant leniency in sentencing a defendant who by his plea ensured prompt and certain application of correctional measures to him, acknowledged his guilt and showed a willingness to assume responsibility for his conduct, and cooperated in the successful prosecution of other offenders. (See A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, secs. 1.8(a)(i), (ii), (v); *cf.* *People* v. *Sivels* (1975), 60 Ill. 2d 102, 105, 324 N.E.2d 422.) A review of the record shows that Battersby satisfied these criteria, and, therefore was properly afforded a more lenient sentence.

Finally, defendant's reliance on *People* v. *Moriarty* (1962), 25 Ill. 2d 565, 185 N.E.2d 688 is misplaced. In *Moriarty,* the court held that a criminal defendant should not be punished by a heavy sentence merely because he exercised his constitutional right to a trial. With this holding we agree. However, there the trial judge in imposing a heavier sentence expressly stated that he intended to punish the defendant's insistence on a trial. In the instant case, no such prejudice was claimed by Massarella, and the trial court imposed the minimum penitentiary

sentence for perjury after careful consideration of the defendant's background. We are of the opinion that the trial court's action was proper.

XIII.

For the crime of theft BJTS was fined $10,000 and ordered to pay $425,407 in restitution less the $100,000 paid by Battersby and Mid-Town Petroleum, Inc. For the crime of conspiracy to commit theft, Mideast received the same sentence. The corporate defendants and Massarella were held jointly and severally liable for the payment of restitution.

A corporation may be ordered to pay restitution in addition to a fine only as a condition of conditional discharge. (See Ill. Rev. Stat. 1973, ch. 38, pars. 2-15, 1005-5-3(f)(1), 1005-6-3(b)(10), and 1005-9-1(b).) At the outset we note that section 5-5-3(a) provides that "[e]very person convicted of an offense shall be sentenced as provided in this Section." However, the UCC contains no definition of the word "person." The UCC is a part of chapter 38 of our statute and is identified as "Criminal Law and Procedure." Section 2-15 of chapter 38 contains the following definition of the word "person":

> " 'Person' means an individual, public or private corporation, government, partnership, or unincorporated association."

It is obvious to us that the legislature in using the word "person" in the UCC was mindful of the definition in section 2-15 and considered that in using the word "person" in the UCC.[6] In any respect the defendant has not raised this point on appeal.

In the instant case the trial court did not sentence either corporation to a period of conditional discharge. There-

fore, the restitution order was imposed in a manner which did not conform to the statute. Accordingly, the sentences of BJTS and Mideast are hereby vacated and the cause remanded to the trial court for resentencing as to these corporate defendants.

For the reasons set forth herein, the judgment of the circuit court of Cook County is affirmed in part and reversed and remanded in part.

Affirmed in part; reversed and remanded in part.

STAMOS, P.J., and PERLIN, J., concur.

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[6] See also the statutory provision for construction of statutes, Ill. Rev. Stat. 1973, ch. 131, par. 1.05, which states:

"'Person' or 'persons' as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals."

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS

First District

People of State of Illinois,

Plaintiff-Appellee

vs.

Benedetto Massarella,

Defendant-Appellant

No. 61346

The Petition for Rehearing is denied.

February 8, 1980

APPENDIX C

IN THE SUPREME COURT OF ILLINOIS

People of State of Illinois,

Plaintiff-Respondent,

vs.

Benedetto Massarella,

Defendant-Petitioner

No. 53179

The Petition for Leave to Appeal is denied.

May 29, 1980

APPENDIX D

Excerpts from original opinion, *People* v. *Massarella,* 53 Ill. App. 3d 774, 10 Ill. Dec. 912, 368 N.E.2d 507 (1 Dist. 1977).

"Following a presentation by assistant Attorneys General of the State of Illinois, the Cook County Grand Jury returned a 49-count indictment on June 8, 1973. That indictment was brought against numerous parties including Benedetto J. Massarella, Raymond J. Battersby, Raymond Weglowski, Eugene Kriwiel, Bee Jay's Truck Stop, Inc. (BJTS), Mideast Transport, Inc. (Mideast), Mid-Town Petroleum, Inc. (Mid-Town), and Midwest Fuel Transportation, Inc. (Midwest). In essence, the indictment charged the named individuals and corporations with conspiracy, perjury, theft, and tax evasion.

After a jury trial Massarella was found guilty of conspiracy, theft, and one count of perjury; he was found not guilty of a second count of perjury. BJTS was found guilty of conspiracy and theft. Mideast was found guilty of conspiracy. Thereafter, Massarella was sentenced for theft to 5 years probation, 2 years periodic imprisonment, and a $10,000 fine, and ordered to pay restitution in the amount of $425,407 to the State of Illinois. In addition he was sentenced to 1 to 3 years in the penitentiary and fined $10,000 for perjury. BJTS and Mideast were each sentenced to pay a $10,000 fine and ordered to pay $425,407 in restitution to the State of Illinois.

Defendants, Massarella, BJTS, and Mideast, now appeal from the judgments and the sentences, raising 15 issues for our review. These issues include whether the indictment should have been dismissed due to the Attorney General's allegedly improper presentation to the grand jury and subsequent prosecution of the cause; whether the trial court should have recused himself; whether the trial

court erred in denying defendants' motion for a substitution of judges; and numerous alleged errors re court rulings pertaining to the failure to dismiss counts in the indictment, continuances, rulings pertaining to the trial of the case, sufficiency of the evidence, polling of the jury, the hearing in aggravation and mitigation, and the sentences imposed.

Many of the counts in the indictment were dismissed prior to trial. Five of the original 49 counts, however, remained in the indictment. The indictees and unindicted coconspirators were charged with conspiring to commit theft of Illinois motor fuel tax monies. Defendant Massarella was charged with committing perjury in a legal proceeding[1] and in certain deposition testimony given in a separate proceeding.[2] In connection with the legal proceeding for which Massarella was charged with perjury, Battersby was also similarly charged. Finally, BJTS and Massarella, individually and as president of BJTS, were charged with theft of Illinois motor fuel tax monies. Defendants Battersby, Mid-Town, Kriwiel, Weglowski, and Midwest pleaded guilty to conspiracy to commit theft. Battersby also pleaded guilty to perjury.

Due to our disposition of the appeal, we need not set forth all of the testimony or pass upon all of the errors raised. The state's evidence purported to show that defendant Massarella entered into an agreement with Raymond Battersby in the summer of 1967 to divert untaxed

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[1] That proceeding was a civil case entitled *Bee Jay's Truck Stop, Inc.* v. *Illinois Department of Revenue,* Case No. 71 Ch 3608 brought by BJTS in the circuit court of Cook County.

[2] The deposition testimony was offered in connection with the civil case entitled *Wells Petroleum Company* v. *James Peterson* v. *P. L. Wright Service Company, Inc., Rella Enterprises, and Benjamin Massarella,* Case No. 71 M1 139418 in the circuit court of Cook County.

heating oil to defendant BJTS for subsequent sale as taxed diesel fuel. At the time, Massarella was both president and sole shareholder of BJTS, a corporation which operated a Chicago truck stop; Battersby was both president and principal shareholder of Mid-Town, a corporation which sold oils, diesel fuel, and gasoline. The untaxed diesel fuel was obtained from oil terminals serving as suppliers to Battersby and Mid-Town and was transported by an employee of Massarella and BJTS in a vehicle owned by Mideast, a corporation controlled by Massarella. In support of their guilty pleas, Battersby and Kriwiel stipulated that Massarella paid them in cash to cover the transactions by maintaining false business records.

The evidence also purported to show that in furtherance of the agreement with Battersby, Massarella entered into additional agreements with other individuals. As a result of such agreements, BJTS received more untaxed diesel fuel from other sources. The fuel was purchased through Rella Enterprises, a sole proprietorship owned by Massarella. Between August 1967 and May 1971, Massarella and BJTS obtained 6,238,057 gallons of untaxed diesel fuel. When BJTS sold the diesel fuel, however, it collected Illinois motor fuel tax from its customers. Thus, the total amount of tax collected and retained by Massarella was $425,407.

Massarella initiated a lawsuit in August 1971, wherein he sought to enjoin the Illinois Department of Revenue from investigating him individually and his business. In the course of that suit, Massarella denied that he had purchased fuel from Mid-Town prior to January 1971, and denied that he had ever purchased fuel through Rella Enterprises. Battersby later admitted that he lied in that proceeding when he denied selling untaxed fuel to BJTS; Kriwiel admitted that he lied to investigators from the

Revenue Department when questioned about the entire scheme. At trial, Massarella affirmed his previous testimony given in that lawsuit. He contended that a former employee owned the vehicle used to haul the fuel and that the employee did so pursuant to an agreement between the employee and Battersby. Massarella denied the existence of any conspiracy involving either himself or BJTS.

Following a jury trial, Massarella was found guilty of conspiracy, theft, and perjury; BJTS was found guilty of conspiracy and theft; Mideast was found guilty of conspiracy. This appeal follows."